The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 14 December 2010

Session 3

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JUSTICE COMMITTEE
36th Meeting 2010, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

Robert Brown (Glasgow) (LD)
Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*James Kelly (Glasgow Rutherglen) (Lab)
*Stewart Maxwell (West of Scotland) (SNP)
*Dave Thompson (Highlands and Islands) (SNP)

COMMITTEE SUBSTITUTES

Claire Baker (Mid Scotland and Fife) (Lab)
John Lamont (Roxburgh and Berwickshire) (Con)
*Mike Pringle (Edinburgh South) (LD)
Maureen Watt (North East Scotland) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Rt Hon Lord Gill (Lord Justice Clerk)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 14 December 2010

[The Convener *opened the meeting at 10:02*]

Double Jeopardy (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I begin with the usual admonition to everyone to ensure that their mobile phones are switched off. We have received apologies from Cathie Craigie who, unfortunately, has had a family bereavement, and from Robert Brown, who is in the building but is engaged on other parliamentary business. I welcome to the meeting Mr Brown's substitute, Mike Pringle.

The first item is our third scheduled evidence-taking session on the Double Jeopardy (Scotland) Bill. I am particularly pleased to welcome today's witness, the Rt Hon Lord Gill, the Lord Justice Clerk.

I will move straight to questions. Leaving aside the proposed exceptions, which we will come to presently, do you think that the bill effectively captures the important elements of a general rule against double jeopardy?

Rt Hon Lord Gill (Lord Justice Clerk): Yes, I think so. The judges are unanimously of the view that the double jeopardy rule is of considerable constitutional significance and that, subject to certain exceptions to which, as you say, we will come, it should be retained. The bill reaffirms the principle of the double jeopardy rule in section 1, which I think satisfactorily covers the matter.

The Convener: That seems to be the fairly solid consensus in the evidence that we have taken over the past couple of weeks.

Section 11 would allow a person acquitted of what, on the face of it, appeared to be a simple assault to be tried again for homicide if the victim subsequently died from the injuries. Are you happy with that provision? One would presume that the Crown might justify it on the basis that fairly limited resources would be devoted to investigating a simple assault and its traditional accompaniment of breach of the peace but there would be a much more thorough investigative process in the event of a fatality.

Lord Gill: The provision is not really that novel. After all, Scots law has always contemplated the competence of prosecuting someone for murder if death follows some time after their conviction for assault and if the assault itself causes the murder. As far as I can make out, section 11 seems to be in line with the Scottish Law Commission's recommendation, with which the judges agreed.

The Convener: That deals with that aspect. Bill Butler has some questions about tainted acquittals.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, Lord Gill. Some witnesses have expressed concern about the scope of the tainted acquittal provisions in section 2. For example, it has been suggested that the possibility of a further prosecution should be limited to more serious offences and apply only to an accused who can be shown to have benefited from the alleged taint. Do you share those concerns?

Lord Gill: The judges support the principle of an exception to the rule against double jeopardy where the acquittal is tainted. The safeguard is that, in the application of the rule, the judge should have the discretionary power to bar a second prosecution and that, in general, there should be a presumption against a second prosecution unless the Crown can make a case for special circumstances that would justify such a move. It seems to the judges that any acquittal that has been obtained by means of what has been in effect an offence against the administration of justice should not be to the benefit of the accused in a second prosecution in cases where, for example, the accused organised for evidence to be suppressed or arranged for perjured evidence to be given by himself and other defence witnesses.

Bill Butler: That is very clear. Are you saying, then, that the interests-of-justice test that is set out in section 2 deals with those concerns?

Lord Gill: That was the overriding idea behind the Scottish Law Commission's recommendations and it appears to us to be a sound practical rule to apply.

Bill Butler: You have no concerns about that.

Lord Gill: I do not think so.

Bill Butler: I am obliged, Lord Gill.

Stewart Maxwell (West of Scotland) (SNP): As a supplementary to Bill Butler's question, I wonder how you view the evidence that we received last week on the difference between section 2 and other sections. The provisions in section 2 are not limited to the list of offences in schedule 1—in other words, they are not just for more serious offences. As a result, a tainted trial could be prosecuted again for any offence.

Lord Gill: I think that, in that respect, the bill goes beyond the original recommendation at paragraph 3.15 of the commission's "Report on Double Jeopardy". As I understand from its

original “Discussion Paper No 141” on Double Jeopardy, the commission was considering the matter in the context of more serious charges.

The specific question whether the provision should apply across the board was not considered by the judges. We gave our consultation response to the commission when it published the discussion paper, but we have not given further consideration to the published bill. I am sorry if that is unhelpful.

Stewart Maxwell: It would perhaps have been more helpful if you had had the opportunity to consider it, but I accept that your original discussions with other judges were on the SLC report rather than the bill.

I will push you a little on a connected issue, which is that there is no limit in the bill on the number of times that a person can be retried in the case of a tainted trial. In other cases, retrials are limited to one more go, if I can put it in that way, but there is no limit in the section on tainted trials. Do you have a view on that?

Lord Gill: I do not really have a view, because my impression is that the commission never contemplated the idea when it formulated its proposals. As far as I know, certainly in England where the legislation has operated for some little time, it has never arisen as an issue. The judges in Scotland were certainly not required to consider it in responding to the commission’s discussion paper.

However, if a series of acquittals were to be obtained by tainted means, there is a certain logic in saying that each time there is a tainted acquittal, the provisions should kick in. That thought has just occurred to me as you have raised the matter, but I cannot speak for the judges on that.

Nigel Don (North East Scotland) (SNP): Good morning, Lord Gill—it is good to see you again. We have heard evidence that suggests that the provisions on admissions in section 3 should apply only to serious cases—I think that we believe that a lot of the bill should apply only to serious cases. Can you reflect on the appropriateness of that criterion, which is not in the bill? As far as I can see, the provisions in that regard cover any circumstance.

Lord Gill: That is right. The judges considered that point in general terms rather than in relation to specific offences. The only point that I would make about the section on admissions is that the judges were quite happy with the idea of founding on a subsequent admission. The question of a prior admission leads us on to a different issue, which is whether it is new evidence, and whether that is a separate exception.

Nigel Don: I was going to come to that issue but, as you have raised it, we will discuss it now.

The commission concluded that an admission that was made before the trial is in effect just new evidence and might as well be treated as such. Do you concur with that view?

Lord Gill: Yes. If there is to be an exception for new evidence, that would constitute new evidence if it passed the test that a verdict that was returned in ignorance of it must be regarded as a miscarriage of justice. That is the usual rule.

10:15

Nigel Don: Yes, and there would be no reason to change that.

I will come back to the general issue. I hesitate to challenge a High Court judge, but I am here to do so. Your comments so far have been on what the judges in general have thought, because you put together a response to the discussion paper. Given that I have got you here, I want to ask you for your thoughts on whether the exceptions to the double jeopardy rule—in particular, because it is where we have got to, the exception for admissions—should apply only to what I shall describe as serious cases, or whether we should write a law that will cover all cases just in case, even though we recognise that it will be used rarely.

Lord Gill: There is no consensus view among the judges on that point. If you are asking for my own view, it is my impression that, if the principle is a good one, it should logically apply across the board. However, a more pragmatic view would be that, if the courts are not to be flooded with minor retrials in which the inconvenience and public cost are out of all proportion to the seriousness of the conviction, there must be some arbitrary limit. That brings us into the political arena, as it is a judgment for the legislature to make.

Nigel Don: Some of my colleagues may want to come back to that issue, so I hope that they will forgive me for jumping ahead.

Would a sensible cut-off point be cases in which the original charge and trial were taken on indictment?

Lord Gill: If we were to confine it to trials on indictment, that would certainly cut down the scope of the problem enormously. Although indicted crime tends to be reported more in the newspapers, it is a very small proportion of the total amount of prosecuted crime in Scotland. As far as public perception of the problem is concerned, it is my impression that these controversies always arise in respect of murder acquittals.

Nigel Don: That would be one way of keeping them there. I will pick up on one other issue in relation to admissions. Section 3(4)(a) refers to "a balance of probabilities" and a credible admission. There are clearly two different concepts in there. First, is "a balance of probabilities" the right expression to use at that stage of proceedings?

Lord Gill: Yes. It is a test that is easily understood and easy to apply, particularly if a judge is making the decision.

Nigel Don: I am grateful to have that on the record. On the issue of credibility, other witnesses have suggested that any admission should be more than credible. The word "reliable" should perhaps be in there, given that we know that many "credible" admissions prove to be terribly unreliable in the light of history. Should the bill say something about the admission including significant information? Should the provision be strengthened, given that the history of admissions in legal systems is not good?

Lord Gill: The judges have no view on that, because they have not had occasion to consider it. Under section 3(4)(a), if the judge is to make a decision on that question and thereby set aside the acquittal, is the test to be whether the judge believes that the admission was made, or must the judge conclude that the evidence is capable of being believed, which may be rather different? The committee will have to consider that point.

Nigel Don: In the particular case of admissions, is it reasonable for us to ask the court that is considering whether there should be a retrial to give some serious thought to the credibility, reliability and significance of that admission instead of drawing the conclusion that we should allow a retrial merely because a jury could believe the admission?

Lord Gill: If evidence of that kind is to be admitted, it will be admitted for the purpose of having it believed by the second jury. That must be right. The admission is being put forward as a missing piece in the evidence that was before the previous jury. Therefore, it would seem to me that section 3 is getting at the fact that the Crown is producing evidence of an admission and saying that, given the opportunity to reprosecute, it will ask the jury to take the admission into account. If that is the purpose of the provision, it would seem to me that the judge's task is to decide whether the admission is capable of being believed rather than whether he or she believes it.

I am beginning to express personal views, and I have to be careful about that, as I am here to give the views on which my colleagues and I have reached a consensus.

Nigel Don: I look to the convener for his agreement, but I think that I am actually asking the Lord Justice Clerk for his views. Where he can speak for others, that is fine but, where he cannot, I am happy to have his view, because it is not often that we get the Lord Justice Clerk before us.

You are suggesting that it is the judge's job to sort out whether the admission would be credible and it is the jury's task to decide whether it believes it, how reliable it is and, therefore, how much notice it takes of it. Is that correct?

Lord Gill: Yes. A sound practical test would involve the judge asking himself, "If this evidence were led, is it the sort of evidence that is reasonably capable of being believed by the jury?"

The Convener: I think that we can see the sense in that.

I should underline that we are quite happy for you to express a personal view as well as the agreed views of the High Court bench—you may, of course, give a caveat when you do so.

One of the aspects that would be considered in an assessment of whether a case should be subject to a retrial on the basis of an admission would be whether the admission included any special knowledge. That would probably be a material consideration. However, of course, at the stage when the appeal court is hearing the submission from the Lord Advocate, only one view—the Crown position—is being advanced. The defence, through representations, could say that it does not think that the admission should be accepted or form grounds for a retrial. Therefore, the matter must go back to a second jury, which will hear the evidence in the manner in which it is presented. Do you agree?

Lord Gill: I agree with that general comment. However, you should remember that, under section 3(4)(d), the defence has the fallback position that, even if the other requirements are satisfied, it might still not be in the interests of justice to have the second prosecution. Quite rightly, the bill expresses that in general terms, because it is not possible to predict all the circumstances in which it could be said to be against the interests of justice to go ahead with a second prosecution.

The Convener: It is very much a judicial point.

Lord Gill: Exactly, and it would have to be considered in the light of the circumstances that were known at the time of the application to reprosecute.

James Kelly (Glasgow Rutherglen) (Lab): The general new-evidence exception was something that the Scottish Law Commission did not come to a firm conclusion on. Leaving aside the issue of retrospective application for a moment, do you support the inclusion of such an exception in the bill?

Lord Gill: I am not quite sure about what you have just said. My understanding was that the Law Commission did not reach a view on whether the new-evidence exception should apply.

James Kelly: That is what I thought I said.

Lord Gill: I am sorry, in that case. The Law Commission was quite clear that it did not want to make a recommendation either way, and the judges were unable to reach an agreement on that point. The views of the judges were divided on the question.

James Kelly: The bill proposes that there should be a general new-evidence exception. As Nigel Don did, can I ask you for your position on that?

Lord Gill: It is a much more difficult point than the tainted acquittal exception. I find the tainted acquittal exception easy to understand, and I think that it is based on a sound principle. As you will have realised from your previous consideration of the bill, the general new-evidence exception raises a host of problems. New evidence brings with it endless scope for argument about whether it is, strictly speaking, new. In applying the test in new-evidence appeals in the appeal court, we insist that the new evidence must be new not only in the sense that it was not considered at the time of the trial but in the sense that it could not, with reasonable diligence, have been discovered at the time of the trial. I rather get the impression that the purpose of section 4 is to reflect the same approach. If that is the view of Parliament, that is an approach that can be applied, as it is routinely applied in new-evidence appeals in the court of appeal. However, it would undoubtedly widen the scope of applications for a reprosecution considerably.

James Kelly: The Scottish Government has indicated that a general new-evidence exception should apply only to a limited number of very serious offences. Is that stated intention effectively implemented in the list of offences set out in schedule 1, coupled with the power of ministers to amend that list by order?

Lord Gill: It is not a matter that I have had occasion to consider in detail, but I cannot dissent from the principle that it is for the Parliament to decide what the listed offences should be and, if need be, for the ministers to decide if and when the list should be amended. That is a perfectly reasonable approach to the legislation.

You will have gathered from what I am saying that I feel that there are dangers in terms of what new evidence could lead to.

10:30

The Convener: I am intrigued by what you are saying, and I have some sympathy with it. Will you detail circumstances in which you think that there could be an adverse consequence?

Lord Gill: There must be many acquittals in the past that are potentially subject to reconsideration in the light of advances in the field of DNA, for example; indeed, I think that there has been such an example in England in the past few days. On the whole, it would seem reasonable to say that acquittals in the past that were reached in ignorance of advances in scientific knowledge could almost be regarded as miscarriages of justice. In a sense, if DNA evidence absolutely rivets guilt on to an individual who was acquitted 20 years earlier, in the days before DNA was known about, their acquittal was a miscarriage of justice, although it was probably not a miscarriage of justice on the basis of the evidence that was led at the time. That seems to be a perfectly reasonable argument in favour of the new-evidence exception.

However, my difficulties are more pragmatic. I wonder about what repeated applications for reprosecution could lead to. The committee may think that the issue of resource implications should not properly be raised if we are dealing with principles, but there could be significant resource implications. We might find that there will be many more applications for reprosecution than grants of authority to reprosecute.

The Convener: A material aspect in the granting of that authority in such a case would surely be whether it would be in the interests of justice for a trial to proceed where the forensics were a material part of the prosecution case, but other aspects of both the defence and the prosecution cases would be tainted by the passage of time. Witnesses' recollections of events that happened 20 years ago cannot be regarded as being accurate to the same extent as more contemporary recollections.

Lord Gill: I agree with that entirely. That is where there is the considerable safeguard of the interests-of-justice test. If there is to be a reprosecution, it will not just be a hearing of the new evidence; it will be a rehearing of all the other evidence, too. That evidence could have become very stale, and witnesses' recollections may have become much less reliable.

Stewart Maxwell: You seemed to suggest that there could be a substantial impact on resources. What was that comment based on? Do you have evidence from somewhere else?

Lord Gill: No, not at all. It simply seems to me to be reasonable to predict that there could be many more applications than grants. We simply do

not know what the outcome of the new-evidence exception will be.

Stewart Maxwell: The changes in the double jeopardy laws in England went through some time ago—in 2005, I think—so we have five years of evidence. In your experience, have many applications been made in England?

Lord Gill: My understanding of the English experience is that the exception has been used very little.

Stewart Maxwell: That is my understanding as well.

Lord Gill: However, I have not gone into the matter in any depth.

Stewart Maxwell: You referred to the Mark Weston case from yesterday, which was the first such case in five years.

Lord Gill: I would like to make it clear that I am not here to advocate the saving of public resources if it is necessary that those resources should be spent. However, I thought that I should put that factor into your consideration.

Stewart Maxwell: You said that you thought there could be a substantial impact on resources. I simply wondered whether you had something particular in mind.

Lord Gill: No, absolutely not.

Nigel Don: I would like to follow up on your point about the need for a complete retrial if there was a reprosecution. Does that mean that, if evidence in the first trial had come from somebody who, 20 years later, is dead and there is literally no way of getting their evidence again, people will not be able to say, "Well, 20 years ago, this witness said the following"?

Lord Gill: There are ways of leading evidence about what was said by someone who is dead. That is not a conclusive difficulty. The much greater danger is that the witnesses are alive and give evidence. [*Laughter*.] If they have only the vaguest recollection of what happened, because it happened a long time ago, that will make life very difficult for the judge who is trying to control the trial, put the issues fairly to the jury, and explain to it how it should approach the evidence.

Dave Thompson (Highlands and Islands) (SNP): Good morning, Lord Gill. There is always a great danger with politicians—alive or dead. I suppose that the thing changes all the time anyway.

I want to ask about the limited serious offences that would fall under the general new-evidence exception, the list and the power in the bill for ministers to change the list by order. We have received evidence that suggests that even if the affirmative procedure were used, that would not be as good as requiring the ministers to come back with primary legislation, which would mean that there would be more scrutiny of additions to the list or deletions from it. Do you have an opinion on that?

Lord Gill: Not really. The idea of ministers being authorised to amend schedules such as schedule 1 is perfectly familiar and routine. There is no objection in principle to that; it happens quite a lot. However, I cannot properly express a view on whether it is better for the matter to be the subject of primary legislation. I am sorry if that is unhelpful.

Dave Thompson: No, that is fine. I simply wondered whether you had a view on that matter, as a number of comments were made about it last week in particular, and we have received written comments on consultation on orders.

Nigel Don mentioned cases on indictment in relation to tainted acquittals and admissions. It has been suggested to us that one way of getting rid of the list, which perhaps is too restricted, or includes too much, would be to say that all cases that are taken on indictment should be open to the new-evidence exception. I cannot remember the figure that has been quoted for the number of cases that are taken on indictment a year—I think that it was 15,000 or 16,000, so potentially a lot of cases would be included. Everyone who was tried on indictment would not have certainty; in a sense, their verdicts would be provisional, in that if new evidence came along, they could all be open to retrial. Do you have a view on whether using cases on indictment rather than a list would be a better approach, or would it be a not-so-good one?

Lord Gill: I have no view one way or the other on that. You are absolutely right, though. The moment that the legislation is passed, a lot of people who have been acquitted in the past will immediately be potentially liable to be reprosecuted in certain circumstances. The Scottish Law Commission made the point in its discussion paper that, in this and other jurisdictions in the world, it has been regarded as an important point that people who are acquitted should not be haunted for the rest of their lives by the fear of reprosecution. That is why there is value in the rule against double jeopardy and why exceptions to it should be carefully limited.

Other than that, I am sorry but I do not have a firm view one way or the other on whether there should be a list or whether all indicted cases should be covered; the judges have no view on the matter, either.

Dave Thompson: I want to ask about the retrospection aspect of the general new-evidence exception. In a sense, there is little difference

between a case that is dealt with a day before the bill becomes law and one that is dealt with a day later. If, 10 or 20 years down the line, new evidence emerges, is there any reason why the legislation should not be applied retrospectively? England, Wales and Northern Ireland have agreed to retrospection. I believe that Australia has also done so, and has allowed individual states to deal with the issue.

Lord Gill: The judges considered the matter in the context of the new-evidence exception and opinion was divided on whether the exception should be introduced. However, on the assumption that there would be such an exception, the judges were of a consensus view that it ought not to be retrospective. I have the judges' consultation response in front of me. I notice that the matter was not the subject of any detailed discussion. The judges' response simply said that the exception "should not be retrospective".

All that I can say to supplement that is that there is general opposition among the judiciary to the idea of retrospective legislation because it raises difficult constitutional matters. I should think that it raises human rights matters as well.

Dave Thompson: Is it not the case that as soon as you have exceptions to the rule against double jeopardy, they are all retrospective because they can go back and deal with something that could not be dealt with before? A cut-off date is neither here nor there in that respect.

Lord Gill: You are absolutely right. If the legislation is passed, there will be an immediate difference between the position of a person on the day before the legislation is passed and their position on the day after it is passed.

Dave Thompson: The views of victims and of society in general should be taken into account. I stand to be corrected, but I understand that the English case yesterday was retrospective. If retrospection had not applied, am I correct in saying that there would have been no justice for the victim and that therefore society in general would have suffered?

Lord Gill: Forgive me, Mr Thompson—I do not mean this to be an unhelpful answer but it seems to me that that is pre-eminently a question for legislators. It is exactly what you are elected to decide, not me. [*Laughter*.]

Dave Thompson: That is very helpful.

The Convener: On the basis that the buck stops here, perhaps I could probe matters a little further, although you may be inhibited from responding. You stated that there were constitutional issues attached to retrospective legislation. Will you expand on that?

10:45

Lord Gill: It is just the general point that is made in relation to any retrospective legislation, which is that you create a liability that applies to someone—but it is a liability that, at the relevant time, did not apply to him and was not imagined to apply to him. It is a simple, general point that applies throughout the whole sweep of legislation.

Of course, there are examples in which retrospectivity is introduced in legislation—it has been done in other statutes—so it is not unthinkable that you can do it here. However, my point—and I am putting the matter very cautiously—is that you have to consider carefully the implications of retrospectivity. There could be human rights implications in the field of criminal prosecution. It may be different in the world of tax, for example, but we are talking about criminal liability and liability to imprisonment.

The Convener: For substantial terms.

Lord Gill: Yes.

The Convener: I listened to what you said about summary matters, but if the legislation is passed, we are totally reliant on the Crown applying it with a degree of common sense. It is only the more serious cases that are likely to be subject to the provisions in the bill.

Lord Gill: Absolutely. Of course, you also have a considerable safeguard overhanging all of this, which is the position of the Lord Advocate, who exercises wise judgment in the public interest. The office of Lord Advocate is a considerable constitutional safeguard.

The Convener: We are totally reliant on the Lord Advocate and her successors adopting an attitude towards the provisions that will ensure that they are used sparingly.

Lord Gill: Yes. That is why, in this country, prosecutions are not conducted oppressively. The office of Lord Advocate is such that before any prosecution is launched, the public interest is carefully considered.

The Convener: You dealt with the human rights implications. Mike Pringle would like to pursue that a bit further.

Mike Pringle (Edinburgh South) (LD): Before I come to that I want to pursue the issue of retrospective legislation. The scientific evidence in the trial that concluded yesterday did not exist 15 years ago. My understanding, if the news last night was correct, is that the person was convicted because there have been considerable scientific advances. DNA evidence was presented at the trial that could not have been presented previously. Given the advances in science, what is your personal view—I do not ask for the judges'

view—on whether it is right that, in such a situation, victims and others should be given closure in a case and should at least know what happened to their loved one? The scientific evidence that emerged is extremely strong. Is that not a reason for having retrospectivity?

Lord Gill: Absolutely. I entirely see the logic of that. For many onlookers and members of the public that is a very cogent consideration. I tried to make that point earlier.

Mike Pringle: Let us turn now to the question of human rights, to which you have referred. Do you have any concerns about the compatibility of a retrospective new-evidence exception with the various rights that are protected by the European convention on human rights? How do you think that is going to play out?

Lord Gill: It is impossible to predict how the arguments will be advanced in any individual case. Protocol 7 to the European convention on human rights has not yet been signed by the United Kingdom, but it recognises the double jeopardy rule and the possibility of an exception for new evidence.

I am not suggesting for a moment that the new-evidence exception per se is not convention compliant—I make it absolutely clear that I am not saying that. However, how it applies in an individual case is a different matter because, under article 6, the overriding question is whether the accused is going to receive a fair trial. One of the problems about legislation of this kind is that it is impossible to foresee all the possible ways in which the fair trial question could arise. Experience teaches us that it arises in many unexpected ways.

Mike Pringle: Absolutely.

The Convener: Yes, we have been caught out a few times under that heading. Let us turn now to applications to the High Court.

Stewart Maxwell: Lord Gill, you earlier touched on the protections that are in place. Before bringing a new prosecution on the basis of one of the exceptions that are set out in the bill, the prosecutor would have to apply to the High Court to set aside the original acquittal and grant authority for a fresh prosecution. Do the judges believe that the bill provides a robust framework for the proper consideration of such applications and do you foresee any practical difficulties with the bill as it is currently drafted?

Lord Gill: The judges have not had occasion specifically to consider that section. All that I can say to you is that there seems to be a useful safeguard in the fact that the decision would be made by a bench of three members of the court, not by a single judge. That would give an added measure of authority to the decision, whichever way it was made.

Stewart Maxwell: You are only speaking for yourself, but you have no problems with that.

Lord Gill: Yes. I have no personal objection to that.

Stewart Maxwell: Okay. That is very clear. Thank you.

The Convener: I have a couple of final questions. Let us go back to the answer that you gave on section 11. You said that you are content with that section, as it is in line with the current law to allow someone who has been convicted of assault to be retried for murder if the victim subsequently dies. However, it is new and beyond the Law Commission's original recommendations to allow a retrial when the assault trial led to an acquittal. Last week, we had the dean of the Faculty of Advocates before the committee. He and other witnesses are concerned about that provision and have pointed out that the circumstances of the assault and the evidence that would be led would be identical—only the consequences would have changed. Is it the judges' view that the provision is justified?

Lord Gill: I regret to say that the judges have not had occasion to consider that specific provision. Also, it is not entirely clear to me what the competing arguments are on both sides of the controversy; therefore, I have not reached a view of my own. If you consider the matter of sufficient importance, the committee might ask the Lord President if he would be prepared to invite the judges to consider the matter and submit a supplementary memorandum of some sort.

The Convener: We will consider the matter.

My colleagues around the table have heard me say, over the years, that hard cases sometimes make bad law. Inevitably, any case that is likely to be subject to any of the provisions in the bill will be a high-profile one that will almost certainly cause great public indignation and concern. In the circumstances, are you satisfied that even members of a jury that is properly directed—as, I am sure, it would always be in our High Court—would be able to apply their minds to consideration of the case without their views having been tainted by the inevitable publicity surrounding the case?

Lord Gill: There are safeguards against the influence of publicity if a second prosecution is being contemplated, are there not?

The Convener: Yes, but publicity would have surrounded the first prosecution and acquittal.

Lord Gill: Absolutely. If the Parliament passes the bill, it will be for the presiding judges at any retrial to give the jury strong directions on the

matter of concern that you have just expressed. It is not a novelty. At the moment, if there is a successful appeal against a conviction, the Crown can, in certain limited circumstances, apply for authority to reprosecute and, if the court grants authority to reprosecute, the trial judges are confronted with the same problem. They deal with it by giving suitable directions to the jury in the normal way.

The Convener: The committee has no further questions. I thank the Lord Justice Clerk for his attendance this morning. It has been an exceptionally valuable evidence session that has given us much food for thought, to which we will apply our minds in private session.

10:58

Meeting continued in private until 13:12.

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